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WM. R. STANSB
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No. [redacted]422

IN THE

SUPREME COURT OF THE UNITED STATES

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, TOGETHER WITH NOTICE OF APPLICATION AND ACKNOWLEDGMENT OF SERVICE THEREOF.

ASA G. BRIGGS,
Counsel for Petitioner,
St. Paul, Minnesota.

IN THE

SUPREME COURT OF THE UNITED STATES

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

NOTICE OF APPLICATION FOR A WRIT OF CERTIORARI.

To Tom Davis and Earnest A. Michel,
his Attorneys of Record:

You, and each of you, are hereby notified that on Monday, June 2nd, 1924, at the convening of Court, or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States a petition for writ of certiorari and brief in support thereof, praying the Honorable the Supreme Court of the United States to cause to be issued a writ of cer-

tiorari directed to the Supreme Court of the State of Minnesota and the District Court of Yellow Medicine county of said state, commanding said courts to certify to the United States Supreme Court for review a transcript of the record and proceedings of said District Court and said Supreme Court in the cause entitled A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, deceased, Respondent, vs. Chicago Great Western Railroad Company, appellant, No. 23898 of said Supreme Court of the State of Minnesota. A true copy of petition for writ of certiorari and brief in support thereof are hereto attached and made a part hereof.

Noa S. Driggs

Counsel for Petitioner.

Service of the foregoing Notice of Submission and a copy of the Petition for Certiorari and Brief in support thereof are hereby acknowledged this 27. day of May, 1924.

John Davis and Ernest A. Michel

Counsel for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

STIPULATION FOR DATE OF SUBMISSION.

It Is Hereby Stipulated by and between the parties to the above entitled action, through their respective attorneys, that the petition for writ of certiorari in the above entitled matter may be brought on and submitted for hearing on the 2nd day of June, 1924, and respondent hereby waives the two weeks' notice required under the rules governing applications for writs of certiorari.

Dated this 23rd day of May, 1924.

ASA G. BRIGGS,
Attorney for Petitioner.

DAVIS & MICHEL,
Attorneys for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court
of the United States:

Now comes the Chicago Great Western Railroad Company and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Minnenota, and to remove therefrom to this court for review the record in the case there lately pending, entitled A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, Deceased, Respondent, vs. Chicago Great Western Railroad Company, Appellant, being cause No. 23898 on the docket of that court, the petitioner herein being the said defendant.

A duly certified copy and nine (9) uncertified copies of the entire record, including all proceedings in the District Court of Yellow Medicine county (Minnesota), where the said cause was tried, and in the Supreme Court of the State of Minnesota, to which court an appeal was taken from the judgment of said District Court, are filed herewith under separate cover.

Petitioner presents this application for writ of certiorari with a conviction of the justness of its position and respectfully prays that its petition be granted, to the end that the particular points raised herein may be fully and finally considered and determined.

STATEMENT OF FACTS.

(The figures in parenthesis refer to the folios in the printed record.)

This action was instituted in the District Court of Yellow Medicine county, Minnesota, by the respondent A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, Deceased, to recover damages for the death of Ring, who received fatal injuries while in petitioner's service as a brakeman.

On October 4, 1922, a west-bound freight train, upon which Ring was employed as a brakeman, stopped at Budd, Iowa (31) to take siding and meet an east-bound train. Ring's train stopped just before it reached the pasing track switch; the switch was thrown and the train started to pull in on the siding. In starting the train a draw-bar was pulled out and an immediate stop was made (33).

The train was standing on a reverse curve and Conductor O'Leary sent Ring to tell the head end brakeman (Quist) to get in position where he could pass on signals to the engine (34). Ring did this; the head end backed up and was chained to the bad order car for the purpose of pulling the train in on the passing track, and switching the bad order car out of the train (35 and 65). They pulled in on the passing track and stopped. The movement contemplated was to bring the engine around to the rear of the train, remove that por-

tion of the train behind the bad order car, leave the bad order car standing on the passing track, couple the two parts of the train together, and proceed (64-69).

After the train had come to a stop on the passing track, brakeman Quist was told by Ring to cut off the engine, and bring it to the rear of the train (298-302-306).

After sending Quist to the engine, Ring and O'Leary, without the knowledge of Quist or the enginemen, went to the bad order car to unhook the chain (36), one on each side of the coupler (37). As they were working there, the car upon which they were working ran back nearly a car length. The conductor walked back with the movement of the train, but Ring, for some reason not disclosed by the evidence, locked his arms around the axle of the bad order car. There was considerable slack in the chain. He then swung his legs and finally his body up over the chain and maintained that position until the train stopped (46). He made no effort to step out from between the cars, although, as the conductor testified, his "idea would be to get out of there" (42). The backward movement was very slow—about two miles an hour (43). The train stopped suddenly, bringing the chain up taut, squeezing Ring between the chain and the draft timber above him, from which injury he died about fifteen days later.

The cause of the train movement is described by brakeman Quist. He first secured "slack" by a short backing movement of the engine (303). He

"pulled the pin" and signaled the engine to go ahead. The train was standing on a grade (326) so that the train when the engine was cut off started a slow backward movement which brakeman Quist stopped by turning the angle-clock on the head car and setting the air (304). It was during this short movement that Ring received the injuries from which he died.

There was a rule of the company providing that employes must give the engineer knowledge that they are going between or under cars and they must know that the engineer has seen and understood their signal before they put themselves in a dangerous position, such as going between the cars (266-267). Ring gave no warning to the engineer that he was going between the cars (268-269). He was familiar with the rule as well as with the grade on which the train stood (264-265). The trial court refused to permit the jury to consider this question in connection with determining the proximate cause of the injury, or for any other purpose (543-544).

An appeal was taken to the Supreme Court of Minnesota from the order of the trial court denying a motion for judgment notwithstanding the verdict or a new trial.

On April 17, 1924, the Minnesota Supreme Court affirmed the order of the trial court, and ordered judgment for the respondent. Final judgment was entered in District Court against your petitioner on May 8th and affirmed by the Supreme Court of Minnesota on May 20, 1924.

THE QUESTIONS INVOLVED.

Your petitioner further states that the questions involved herein are as follows:

First. The facts do not bring the case within the Safety Appliance Act. The car had come to rest on the side track and had ceased to be "used" as contemplated by the Act.

Second. The defective draw-bar did not proximately contribute to the injury.

(a) There were three active forces intervening which, when combined, constituted the intervening, efficient force and operated to make the faulty coupler a remote cause or condition, to-wit:

(1) Ring himself sent the brakeman Quist with directions to cut off the engine without advising him or the engineman that he was going between the cars. It was in carrying out Ring's directions that any motion of the train took place. Ring controlled the movement of the train (298-300).

(2) In placing himself between the cars without notifying the engine crew he knowingly and wilfully violated a rule promulgated for his benefit (264-265). This together with the instructions he gave Quist to cut off the engine on the grade was more than contributory negligence.

(3) When the backward movement started instead of stepping out from between the cars to a

place of safety as he could have done, and as the conductor did (38-42) he swung his legs and then his body up, and over the sagging chain and by so doing deliberately invited death or serious injury. The chain very naturally pulled taut when the movement ceased and he was caught between the chain and draft rigging. The emergency was created by Ring's instructions to Quist and Ring's going between the cars without notice to Quist or the enginemen.

(b) The probability that an injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely under all the circumstances that it could not reasonably be foreseen. No one would anticipate that Ring would put himself in the position he assumed at that time, especially in view of Ring's knowledge and violation of the rule made for his protection.

Third. The question of deceased's violation of rules should have been submitted to the jury. The violation of the rule constituted negligence subsequent to and independent of the question of defective safety appliance. Your petitioner was entitled to have this fact considered by the jury in determining the proximate cause of the injury.

PRAYER.

In order to correct the error complained of and to the end that the right and liability of petitioner may be determined in accordance with Federal law, your petitioner prays that a writ of certiorari may be issued under the seal of this court directed to the Judges of the Supreme Court of the State of Minnesota and of the District Court of Yellow Medicine county commanding them, and each of them, to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court of the State of Minnesota in the within cause to the end that the judgment of said Supreme Court of the State of Minnesota, in said cause may be reviewed by this court as provided by law, and that your petitioner may have such other relief as to this court may seem appropriate.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Petitioner.

By .....

Attorney for Petitioner.

STATE OF MINNESOTA,

County of Ramsey. ss.

ASA G. BRIGGS, being first duly sworn, says that he is the attorney for the petitioner, Chicago Great Western Railroad Company; that he has read the foregoing petition; that he has also read the certified copy of the transcript of record under the seal of the Supreme Court of the State of Minnesota in the case of A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, Deceased, Respondent, vs. Chicago Great Western Railroad Company, Appellant, and that he is familiar with the same; that he has also read a copy of the opinion of said Supreme Court in said cause; that the matters of fact stated in said petition conform to said record and opinion and are true to the best of his knowledge, information and belief.

ASA G. BRIGGS.

Subscribed and sworn to before me this 15th day of May, 1924.

A. V. JUNKIN,

(Notarial Seal) Notary Public,

Ramsey County, Minn.

My commission expires Sept. 19, 1930.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE FACTS DO NOT BRING THE CASE WITHIN THE SAFETY APPLIANCE ACT. THE CAR HAD COME TO REST ON THE SIDETRACK AND HAD CEASED TO BE "USED" AS CONTEMPLATED BY THE ACT.

As stated in a recent Federal case involving Section 2, Act of March 2, 1893, as amended 29 Stat. 85, and Act of March 2, 1903, 32 Stat. 943, "the association of the word 'used' with the words 'hauled or permitted to be hauled on its line' clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place or of the car from the place where found to be defective or insecure to the place of repair. It does not mean such use of the car elsewhere or in other relation than such hauling or movement."

McCalmont v. Penn. Ry. (1921), 273 Fed. 231. Aff. 283 Fed. 736.

And this also is what the defendant contends is meant by the term "use".

Let us examine the immediate facts of the case. The draw-bar had pulled out on the main line at Budd. It was then chained up and hauled onto the side track, to be taken out of the train. Now, during this movement nothing occurred. The car was safely shoved in to rest on the siding and at

that moment, having so been placed on this side track, it ceased to be "used" by the carrier. From this time on, then, the Safety Appliance Act did not govern the case. To illustrate our point we recite the facts and holding in the McCalmont case, supra. The defective car had been placed on a siding. It was chained to another care and deceased went between the cars to adjust the chain length without putting out a signal as required by the rules. While so doing another car was "kicked in," colliding with the defective car and killed the plaintiff's intestate. The Court there said:

> "In addition thereto it does not seem to me that the car which caused the injury was in use within the meaning properly to be given to that word under the Safety Appliance Act. The defendant was not hauling it or permitting it to be hauled or used on its line. It had taken it out of use and placed it on a dead track and the hauling or the movement of it from that dead track to the repair place which is permitted to be done only at the risk of the defendant, had not yet begun, and was not then in immediate contemplation * * * he was merely making a temporary repair to the car upon the dead track so that at some future time it might thus be moved or hauled. The law does not forbid or prohibit work upon a car on a dead track so as to put it into condition thus to be moved or hauled; nor does the law impose an absolute liability upon the interstate carrier for injury sustained by one engaged in doing that kind of work. In that situation and while doing that kind of

> work the applicable law, it seems to me, would be the negligence rules provided by the Federal Employers' Liability Act and not the absolue liability of the Safety Appliance Act.
>
> For the foregoing reason I am of the opinion that defendant's motion (for judgment) should be granted."
>
> McCalmont case, supra, at page 240.

Now, in that case, and in the one under discussion, the salient points are the same, in that in both the car was on the siding; the car was standing still; there was a defective coupler; the deceased was adjusting or uncoupling a connecting chain, and there was a violation of the company's rules governing the situation.

As in that case the car was out of service. It had ceased to be "used." If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate the law. If they hauled the car they violated the act, and if they did not haul the car they violated the act.

Another case apparently sustaining the view that this case does not come within the Safety Appliance Act is that of *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441.

A conductor was endeavoring to adjust a faulty coupler at one end of a string of cars when other cars were shoved in on the same track and struck the one he was working on in such a way as to kill him.

In denying the plaintiff's requested instruction upon assumption of risk, the trial court said:

> "Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads: 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' I decline to charge as requested, because this is not an action of the kind specified in Sec. 4."

The refusal of the requested instruction was sustained by this court.

We see no essential difference in the situation in that case and the one at bar. It cannot be that the company is without an alternative to avoid the absolute liability of the Act under these circumstances, whether it uses the car or sets it out. This car was no longer being "used" by defendant and had been placed on the siding to avoid using.

Petitioner earnestly contends that this case does not come under the Safety Appliance Act. It comes under the Federal Employers' Liability Act and is governed by the rules of negligence of that act.

II.

THE DEFECTIVE DRAW-BAR DID NOT PROXIMATELY CONTRIBUTE TO THE INJURY IN THIS CASE.

The question of whether a particular act is remote or proximate, it is contended, is purely a question of law. The jury may have a function in drawing certain inferences and determining disputed facts, but where the facts are clear the court, through definite principles of law, determines the limits of proximity and does not leave it at large to the jury.

It is the defendant's contention that while the defective coupler under the law may have at one time constituted an active force, it had, prior to the accident, when the car had come to rest on the side track, become a *passive* force. Each time one or more active causes operate on a condition to create a new condition, a new causal step is taken, ending with a given result. This result is the direct result of the active force which last acted upon the immediately precedent condition, and is the indirect result of the earlier acting forces. *In other words, the subsequent coming into action of any other force is the direct cause of the result.* All other forces are indirect and at the time of the intervention become *ipso facto* remote. The final active force must be the efficient cause which is more commonly called proximate.

The most common way of enunciating the rule of liability is that the injury must be the natural

and probable or natural and proximate result of defendant's act. A more accurate phrase would be that *the intervening force must be foreseeable, otherwise the result is made remote.*

A. THERE WERE THREE ACTIVE FORCES INTERVENING, WHICH, WHEN COMBINED, CONSTITUTED THE INTERVENING EFFICIENT FORCE AND OPERATED TO MAKE THE FAULTY COUPLER A REMOTE CAUSE OR CONDITION, TO-WIT:

1. Ring himself sent the brakeman, Quist, with directions to cut off the engine. It was in carrying out his direction that any motion of the train took place. Ring controlled the movement of the train (298-299-300).

2. In placing himself between the cars without notifying the engine crew, he knowingly and wilfully violated a rule promulgated for his benefit (264-265), which constitutes more than contributory negligence in view of his instruction given to Quist. Danger was not remote, but immediately imminent. It must be conceded that the violation of this rule constitutes negligence. 18 R. C. L., Sec. 152. And its relation to proximate cause will be discussed under the next subdivision of this brief.

3. In addition to this, when the backward movement started, instead of stepping out from between the cars to a place of safety, as he could well have done, and as the conductor did (38 and

42), he swung his legs, then his body up and over the sagging chain, and by so doing deliberately invited death, or serious injury. The chain very naturally pulled taut when the movement ceased and he was caught between the chain and the draft rigging.

We are not trying to convert actual contributory negligence into proximate causation as has been contended by respondent.

The principles of causation have not been changed by any statute and remain as at common law, and

> "It has been the policy of the common law to fix liability *in solido* with reference to the cause which stands closest to and in most immediate connection with the injurious result."
>
> 18 R. C. L. 156.
>
> See Ann. Cas. 1913 B. 791.

As it is said of compensation cases, the doctrine of *novus actus interveniens* always asserts itself in these cases, because it forms the basis of controversy, viz., the more immediate cause of the injury; but the weight of authority is to make the liability of the original actor depend upon whether such negligent or even wilful intervening act was foreseeable.

Pollack, Torts 37.

In addition to the rule of the defendant violated by Ring, the plaintiff is confronted with the following general common law rule: That a railroad employee when about to put himself in such a

position with respect to a stationary car, if it should be moved unexpectedly, he would in all probability be injured, is bound to notify all other employes whose work may in its progress produce a movement of the car, or put out some signal which will show them where he is.

L. R. A. 1918 C., p. 380.

Illinois, etc., v. Winslow, 56 Ill. App. 462.

In view of the circumstances intervening, the one time negligence of the defendant became *remote* and at the time of the accident became the *occasion* which merely provided an opportunity for the intervening causal agencies to act; or it may even have set them in motion. The statute has not changed the rules relating to proximate cause.

The New International Dictionary says:

> "The *cause* of an effect is that which actually produces or brings it about; the *occasion* is that which either directly or indirectly provides an opportunity for the causal agencies to act or serves to set them in motion."

The question of a wilful violation of the rule is infinitely important on the question of proximate cause, more especially that phase of it dealing with whether Ring's act was foreseeable by the defendant.

We cite *Kentucky, etc., Ry. v. Minton*, 180 S. W. 831, as a case involving this question.

Plaintiff undertook to repair a defective coupler on a car standing on the side track, without putting out any signal that he was assuming a dangerous position. While in that position a string of cars was shoved in, moving the one upon which plaintiff was working, seriously injuring him. After reviewing the facts, the Court said:

> "We conclude, then, that under the facts and circumstances exhibited by the record, it was the duty of plaintiff to have observed the rule, unless same had been abrogated by some custom or usage, or mode of conduct, or other excusing circumstances, in which all parties participated, *and his failure to do so constituted negligence on his part which was the sole producing cause* in law of his injuries."

And as in that case a rule which had not been abrogated by custom, usage or other mode of conduct was violated by Ring, resulting in his death. Wherein has the coupler played a part except as providing an occasion for his being there? A rule of law and a rule of the defendant's were both violated by Ring.

The exact point involved in this case is well illustrated in the recent case of *Rittenhouse v. St. L. & S. F. Ry. Co.*, 252 S. W. 945 (Mo.) The syllabus reads:

> "Where a car repairman was injured immediately after placing himself in a perilous position between two cars on an active switching track, the fact that he failed to realize his peril did not relieve him of the duty to warn

the crew of his intention to enter between the cars.

"*Held*, that his failure to warn the switching crew, and not the defective coupler, was the proximate cause of the injury by the movement of a third car."

The fact that Ring controlled the movement of the train is entitled to serious consideration by the Court. Illustrative of this point is the recent case of *Davis v. Hand*, 290 Fed. 73. In that case Hand gave the signal that moved the train. In the case at bar Quist gave the signal at Ring's direction, and so in effect it was Ring's signal.

Illustrative of a defective appliance providing an *occasion* for an accident and not being the proximate cause is found in *Phillips v. Penn. R. R.*, 283 Fed. 381, as well as in the case of *Great Northern Ry. v. Wiles*, 240 U. S. 444.

B. THE PROBABILITY THAT AN INJURY WOULD BE CAUSED BY THE ALLEGED VIOLATION OF THE SAFETY APPLIANCE ACT WAS SO UNLIKELY, UNDER ALL THE CIRCUMSTANCES, THAT IT COULD NOT REASONABLY BE FORESEEN.

Was Ring's act in assuming this dangerous position under the circumstances of this case reasonably foreseeable by Quist or the enginemen drawing the train? They had been directed by Ring to do what they did do with no word or signal from Ring that he was going between the cars. They had a right to understand he was not between the

cars. With this knowledge they were not negligent.

When the company lays down common sense rules for the protection of its employees may it not rely upon their observance, as the natural course of events? The rule book in this case provided as follows (267-268):

> "707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essential to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed, before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."
>
> (Ex. 26, 267-268.)

This rule was not complied with (268-269).

Because of the rash act of the deceased in omitting to notify or signal the engineer of his intended move, the latter was warranted in believing it was safe to uncouple the engine from the train, especially on the orders of a brakeman sent there for that specified purpose by the deceased, Ring. Quist had been ordered there to handle the engine, to direct the engineer in pulling in on the siding *and thereafter to cut off the engine and "come around."* To do so required slack, and this was well known to the deceased. He also knew the grade conditions.

This rule was made for the protection of the employees—each knowing it relies on the other's observance. It is one of the most valuable and beneficial rules promulgated by the company. There is no evidence of its disregard. Its observance constituted the very essence of safety and protection to fellow workers. It is not a rule that could be said to be in conflict with the law, but is in furtherance of the law—bringing home to men working side by side the duty imposed upon them by common prudence, and by the law without a rule.

The proximate consequences for which a defendant is liable are restricted to those which should reasonably have been foreseen, and we submit defendant was not required to foresee this grossly negligent conduct of Ring's. To impose such a duty would be to impose the impossible. The coupler was out of use. The movement of the train was one of the causes of the accident. Ring's instructions to Quist was another, and Ring's violations of the rule was a third. All of these causes intervened after the coupler defect. The defective coupler, as stated, only provided the occasion.

Quoting from *San Antonio, etc., Ry. Co., v. Behne*, 231 S. W. 354 (Tex.):

> "*The causal connection between the negligence which put in motion that agency, and the injury, is not controlled by the fact that the agency acted directly upon the injured party.* The causal connection was broken in contemplation of law, by the intervention of

> disconnected and independent agencies brought into being by a chain of circumstances so improbable as to render them in law unforeseeable."

The violation of the Safety Appliance Act, if any, had spent itself when the cars came to rest and was at most only reflected in the physical setting which the cases describe as the "occasion" or "condition" of the injury, as distinguished from its proximate cause.

We submit, in concluding this section of the brief, that the injury, under the evidence, cannot be attributed to a violation of the provisions of the law, but only that, it provided the occasion for the accident. In other words, an attempt to apply the "but for" rule is made by the respondent. That rule has long been abandoned for it involved the tracing of endless conditions and circumstances too devious for the courts to follow and administer substantial justice.

III.

THE QUESTION OF DECEASED'S VIOLATION OF RULES SHOULD HAVE BEEN SUBMITTED TO THE JURY. THE COURT ERRED IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION TO THIS EFFECT.

The trial Court refused to submit the question of deceased's violation of the rules for any purpose, even as bearing on the question of proximate cause. He attempted to leave to the jury the ques-

tion of proximate cause in a general way and refused to permit the jury to consider the violation of this rule in that connection, saying, "I don't believe that is the law," and his ruling was sustained by the Supreme Court.

The charge of the Court is in effect a withdrawal of the question of proximate cause. For the Court says, "that the decedent violated those rules, would not be a defense to the company, or defendant." One of the causes of this accident was the violation by Ring of this rule. The Court tells the jury that this negligence of Ring's is no defense, which is equivalent to saying his negligence cannot be the proximate cause. This is said to the jury in such a plain and emphatic way at the conclusion of the charge and just as the case went to the jury, that it carried great weight. It was done by the Court with full and fair knowledge of the contention we now make. All that had previously been said about proximate cause was nullified.

> "Not only has an employer a strict legal right, but there rests upon him a legal duty as well to promulgate rules and regulations for the guidance and protection of persons who may engage in his services. There is correlatively an obligation resting upon employees to yield obedience to all proper rules and orders; and if an employee sustain an injury by reason of a violation of the employer's regulations, orders or commands, he will be barred of all right of recovery from the employer on the score of the latter's negligence"
>
> * * *

Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."

18 R. C. L., Sec. 152.

See Ann. Cas. 1912 A. 91 (85).

"Where the evidence is conflicting the question of whether the violation of the rule was or was not the proximate cause of the injury is properly submitted to the jury."

Hampton v. Chicago, etc., R. Co., 86 N. E. 243 (Ill.).

And putting it conversely:

"The violation of a rule by an employe where such violation is the proximate cause of the accident is negligence as a matter of law."

Fernette v. Pere Marquette Ry., 141 N.W. 1084 (Mich.).

There can be no doubt but what under certain conditions the violation by a servant of a regulation adopted by the master for the safety of the servant is negligence *per se* on the part of the servant.

G. N. Ry. Co. v. Hooker, 170 Fed. 154.

And such violation always goes to the question of negligence whether due to thoughtlessness or willfulness.

Gleason v. Detroit, 73 Fed. 647.

Lake Erie, etc., v. Craig, 80 Fed. 488.

In speaking of compensation cases, where even most strict liability is imposed, it is said:

> "Violations of rules designed to safeguard the employees is generally held, as a matter of fact, to constitute wilful misconduct, and to debar the employee, or his dependents, in case of death, from any right to recover compensation."
>
> 4 A. L. R. 119, note.

We have shown by numerous citations from cases and encyclopedic works that the rule violation constitutes negligence from whatever angle it is viewed. It follows that if it is evidence of negligence it must be considered together with the other acts of negligence, and the other intervening circumstances, to fairly determine proximate causation. Even aside from the other two intervening agencies we had a right to have this question sbmitted to the jury, for

> "Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."
>
> 18 R. C. L., Sec. 152, and cases cited.

The Court below not only refused defendant's requested instruction that the rule *might* be taken into consideration in determining proximate cause, but affirmatively charged the jury that it *could not* be taken into consideration for any purpose (541-543). And it thereby committed error that only a new trial can remedy.

We submit that the petitioner was deprived of the rights given it under the Federal law involved in this case, that the decision is at variance with

the holdings of this court, and that the writ of certiorari should go.

Wm. E. Briggs

Attorneys for Petitioner.

FILED
SEP 27 192
WM. R. STANSB

No. 422.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

REPLY TO MOTION OF RESPONDENT TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

ASA G. BRIGGS,
Counsel for Petitioner.

No. 422.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

REPLY TO MOTION OF RESPONDENT TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

I.

THE WRIT WAS PROPERLY GRANTED AND THE COURT CORRECTLY APPRIZED OF THE FACTS.

The petitioner takes exception to the charge of respondent that the court has been misled as to the facts and as a consequence the writ was improvidently granted. The petition for the writ disclosed

the facts and issues just as petitioner understands them and just as they appear on the record. Counsel had and took their opportunity to place before this court, their version of the facts. They filed a brief and accepted the facts stated in the petition as satisfactory. They made no complaint at that time.

No reason exists why this cause should be accorded different treatment than other like causes brought regularly before the court by certiorari, or why the rules of procedure adopted by the court should be set aside for the convenience of respondent and petitioner be forced to an inadequate and summary disposition thereof.

I.

It is admitted that the train upon which Ring was a brakeman was engaged in Interstate Commerce and that a conductor was in charge thereof; that the car was drawn a few car lengths from the main line to the passing track with a defective drawbar, but deny that any injury occurred during the time it was so in use. The injury was received after the car had ceased to be in use. Respondent has assumed (bottom page 5) that the injury occurred during the movement from the main line to the side track. The record discloses that that movement was completed without a mishap. Thereafter and when the car had been set in on the side track Brakeman Quist was told by Ring to cut off the engine and bring it to the rear of the train

(298-302-306). After Ring sent Quist to the engine, Ring and O'Leary, without the knowledge of Quist or the enginemen, went to the bad order car to unhook the chain (36), one on each side of the coupler (37). When the engine was cut off this car ran back about one car length and the front car of the train about five to seven feet before Quist got the angle cock turned and the air set. The Minnesota Supreme Court not quite accurately says: "The train *backed* up without warning and the conductor straightened up and walked back with the movement of the train. The decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and *he swung his body up over the chain, apparently to ride thereon* in the brief movement of the train." The chain pulled taut and injured him. The State Court here recognized facts which, together with the other negligence of Ring, constitute the sole cause of the accident. No one directed Ring to assume this position of obvious danger.

As we have more fully set out in our brief, Brakeman Ring sent Brakeman Quist to cut off the engine and any movement that occurred resulted from this direction. It is immaterial what authority Ring, the senior and rear brakeman had over the head brakeman—it is a fact that Ring directed Quist as follows:

> "Q. And then what did you do?
>
> A. I stayed right there and waited a few minutes, not so very long, and got a signal to go ahead.

Q. And then what was done?

A. And then I says, what happened back there, did we get a draw-bar? Yes.

Q. Who did you say that to?

A. To Ring.

Q. Did Ring answer?

A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear. He says, that remains to be seen, go ahead and pull him in, and come around with the engine.

Q. What does that mean?

A. Well, I took it to mean that I should go in and go around with the engine.

Q. That expression?

A. *That means that, to go around about my business, to go up there and get into clear, and come back.*

Q. Cut off the engine?

A. Yes, cut off the engine, and come back.

Q. Was that done?

A. Yes, sir.

Q. And the train was pulled in onto the passing track?

A. Yes, sir." (297-299.)

Quist acknowledged this direction from Ring and carried it out. Ring gave the order to Quist and *he thereby controlled the particular movement* that caused his death. Following the giving of this order he violated a fundamental rule that had been made for his guidance and safety by going between the cars without notice to the enginemen. He did this before his directions to Quist had been complied with. When the engine was cut off, and in consequence thereof, the movement occurred. The

fact that the conductor accompanied him when he went between the cars in no way relieves him from responsibility. The fact that a conductor was in charge of the train operates in no way to relieve Ring from his obligation to signal the engineer of his intent to go between the cars. The duty to give this signal rested on Ring whether he was in charge of the train or not. This obligation rests on all trainmen when going between cars in a train.

Respondent's brief is redundant with assertions that Conductor O'Leary was in charge of the train. That is true. We stated in our brief that O'Leary was the conductor.

It is said we misrepresented the facts in stating that the case does not come within the Safety Appliance Act. This was a statement of a plain conclusion of law—a point to be argued when the case is heard on the merits. Whether or not the court accepts our view should be determined after argument on the merits. Respondent's quotations from the Minnesota Supreme Court are unfavorable to us. That was our reason for seeking this writ.

Whether or not the car was "at rest" on the side track is another point to be determined on final hearing. Merely asserting that it is or is not does not make it so. If it was at rest the cases we cite are authority for the position we take.

On page 19 of their brief counsel again have confused a conclusion of law heading one section of our brief to the effect that "the probability that the injury would be caused by the alleged violation of

the Safety Appliance Act was so unlikely that it could not reasonably be foreseen." Counsel have attempted to conclude this point by calling attention to the fact that a violation of the statute is negligence *per se*. Our point has direct reference to proximate cause and we had always thought it fundamental that no one was held for an unforeseeable consequence of his negligent act, for an unforeseeable consequence is not a proximate result. The fact that negligence exists is always assumed in treating proximate cause.

THE RULE VIOLATION.

On page 20 of the brief respondent argues that Ring's violation of the rule pertaining to going between the cars could be no more than contributory negligence at the most. Not only would the jury have been justified in finding that Ring's violation of this rule was the sole proximate cause, but they could have and should have taken this evidence of Ring's negligence into account *with the other acts of negligence* in determining the proximate cause of the unfortunate result. *This they were not permitted to do.* The trial court forbade the jury to take this rule into account "for any purpose." (541-543.) Respondent's contention is met by the rudimentary mathematical proposition that no part of the whole can equal the whole. Their contention is that this negligent act of Ring's, standing alone could not be a defense, therefore the jury should not be permitted to consider it. Our contention is that petitioner had an absolute right to

have *all* evidence of negligence considered by the jury in determining the proximate cause, and the fact that this right was denied is assigned as an error for review.

At page 21 of respondent's brief objection is made to our use of the term "dead track." In view of the very full statement of all the circumstances and movements, however, the character of the track and the use to which it was put, was made plain in our petition and we cannot feel that the court could in any manner have been misled by any misuse of this single term. The track was as to this car a dead track because this car was to be cut out of the train where it was on this track. If the use of the term "dead track" was not entirely appropriate it could not mislead because it appears clearly that the track was a passing track on which the whole train stood.

II.

The authorities cited by respondent, to the effect that a cause will be dismissed where the writ is improvidently granted, are controlling, and properly so. But they are of no value when the writ is not improvidently granted, and where the court has been fully advised of the facts by petitioner. Respondent filed an answer to the petition for this writ. No exception was taken therein to any of the statements now complained of.

One reason respondent urges (page 23) is that the "lower courts" (there being one trial and one appellate court) were unanimous in holding the

petitioner liable for this accident. That both of the lower courts are adverse to the petitioner affords no presumption that this court did not properly consider its action herein.

Respondent presents what is claimed to be another "misstatement" (page 24 of its brief). It is claimed that our brief stated "that the cause involved a grave question of vital importance to the public." There is no such statement in the petition.

Respondent asserts (page 27) that the practice of railway companies in filing petitions for writs of certiorari in "simple personal injury cases" is a continuing and growing one, and inferentially urges that this court discourage the "practice" and indicate its attitude by dismissing the present writ —affirming the judgment without allowing petitioner to be heard.

This summary disposition of the matter would doubtless be highly pleasing to respondent, but the court must also take notice of another practice likewise continuing and growing—that unparalleled wave of personal injury suits, accompanied by prodigious verdicts with an undue tendency of some courts to sustain verdicts for plaintiff. Defendants should be denied recourse to the courts of review—a right of every litigant. It is their only protection against erroneous rulings below.

We have here a case brought under Federal law and involving from the outset the question of whether under this set of facts liability is imposed by the Federal law and holdings of this and inferior Federal tribunals.

This Honorable court, after reviewing the facts of the case, which are not altered by respondent's motion, has seen fit to grant a Writ of Certiorari to the end that questions raised herein might be fully and finally argued and determined. The court has considered the petition and granted the prayer and a brief is now being prepared to submit at the proper time. There seems to be no good reason why the matter should be disposed of in the extraordinary manner sought by respondent.

There is probably no cause that reaches this court that is not as much entitled to advance hearing as is this cause. There is nothing unusual in this respect about this cause.

We feel that respondent's claims that the court has been illy-advised, has illy-considered its action and improvidently granted the writ and that the cause should be advanced and placed on the summary docket is not well taken, and accordingly pray that the motion in all respects be denied.

Respectfully submitted,

ASA G. BRIGGS,
Counsel for Petitioner.